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In the

Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 375.

THOMAS B. HASSETT, Individually and as Former Acting Collector, *Petitioner*,

v.

E. SOHIER WELCH, ET AL., Executors, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the Circuit Court of Appeals (R. 119) is reported in 90 F. (2d) 833.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 1, 1937. (R. 128.) The petition for certiorari was filed on September 1, 1937, and was granted October 18, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932 (which amend Section 302 (c) of the Revenue Act of 1926) should be construed to require that in computing the Federal estate tax of a decedent who died November 20, 1932, there be included in his gross estate the value of property transferred by him in 1926 irrevocably to a trust, under which the income was to be paid to him during his lifetime.

2. Whether, if so construed and applied, such amendments to Section 302 (c) violate the due process clause of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 39–43. The most important clause, for purposes of this case, is that italicized in the following extract from Section 803 of the Revenue Act of 1932 (the italicised portions representing new matter):

> "(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, . . .*"

This substantially re-enacted the amendment made to Sec. 302 (c) by the Joint Resolution of March 3,

1931. Sec. 302 at all times contained subdivision (h), printed on pp. 39–40, *infra*.

STATEMENT.

The decedent, Frank H. Beebe, died November 20, 1932. The respondents are the executors of his will. (Paragraph 1 of declaration admitted by paragraph 1 of amended answer, R. 3, 15.)

On February 13, 1924, the decedent executed an instrument assigning all property which he should receive under the will of his brother (who was then living) to trustees to hold until the death of the survivor of the settlor and certain other named persons, to pay the income to the decedent himself during his lifetime and after his death to pay one-third of the income to a named nephew during his lifetime, and thereafter to the issue of this nephew; one-third of the income to a named niece during her lifetime, and thereafter to her issue; and one-third to the issue of this niece. Upon the death of the last survivor of the named beneficiaries, the principal of the trust estate was to be paid over, one-third to the then living issue of this nephew and two-thirds to the then surviving issue of this niece *per stirpes* with cross-remainders. The trust instrument contained no warranty or covenant or any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24, 25, 104–108.)

After the death of the brother of the decedent, the decedent on October 22, 1926, by an instrument in writing ratified and confirmed the original trust instrument, making no change in its provisions. (R. 25, 26, 109.)

In 1926 and 1927, the trustees received the property

to which the settlor became entitled under the will of his brother. They have ever since been holding that property and administering it under the terms of the instruments executed on February 13, 1924, and October 22, 1926. (R. 26.)

The Commissioner determined that the value of the property transferred to this trust should be included in the gross estate, and after the deficiency tax was paid denied a claim for refund. Neither in the deficiency letter nor in the letter denying the claim for refund did the Commissioner rely on the amendment to Sec. 302 (c) of the Revenue Act of 1926. (R. 8, 14.) But by amended answer filed in the District Court on February 13, 1936, the Government did assert this as a defense. (R. 15–17.) The District Court decided the case for the Government on other grounds and did not pass upon the questions involved in this petition.

The holding of the Circuit Court of Appeals on the questions involved in the petition is contained in the following paragraph of its opinion (R. 127):

> "At the time of the transfer Sec. 302 (c) of the Act of 1926 applied only to estates transferred in contemplation of death. Since the District Court refused to find as a fact that the transfer was made for that purpose, it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before. To give to the statutes above referred to a retroactive effect under such circumstances would be a violation of Art. V of the Constitution. *Heiner* v. *Donnan*, 285 U.S. 312; *Nichols* v. *Coolidge et al.*, Exrs., 274 U.S. 531; *Helvering* v. *Helmholz*, *supra*; *Poor* v. *White*, *supra*."

SUMMARY OF ARGUMENT.

I.

If the amendments to Section 302 (c) of the Revenue Act of 1926 were construed as applicable to the transfer in trust here involved, they would be unconstitutional as violating the Fifth Amendment.

When the transfer in question was made, the Revenue Act did not require its inclusion in the gross estate. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782. The corpus of the trust estate irrevocably passed out of the decedent in 1926, and it is the corpus of that estate which the Commissioner is now seeking to tax by virtue of a statute passed after the gift had taken effect.

There was no transfer at the death of the decedent. The estate tax is a tax upon transfers at death. Although Congress may include in the gross estate gifts which are essentially testamentary in character, the inclusion of any transfers *inter vivos* may be justified only to the extent to which such inclusion is a proper adjunct of the general scheme of the estate tax.

It is established that a transfer in trust, leaving the corpus subject to no control of the donor, is not essentially testamentary in character, even when the donor reserves a life estate. See *May* v. *Heiner*, 281 U. S. 238, 243; *Levy* v. *Wardell*, 258 U. S. 542, 544. Even if Congress may include in the gross estate some transfers which are not essentially testamentary in character, nevertheless a statute which imposes a tax upon them retroactively is capricious and arbitrary.

The situation here involved is similar to that presented in *Levy* v. *Wardell, supra; Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440; and *Helvering* v. *Helmholz*, 296 U. S. 93. The same ob-

jections which were held fatal to the statutes in those cases are present here. This Court has uniformly held unconstitutional provisions of federal statutes seeking to impose a tax on gifts fully consummated before the enactment of any provision imposing a tax upon them.

All of the cases which have decided the precise situation under consideration here have held in favor of the taxpayer.

The contentions made by the petitioner are untenable.

The cases which are cited in support of the position that taxes may be collected retroactively are all distinguishable. They involve entirely different situations and different kinds of taxes. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 175; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429 (*infra*, pages 15–16, 17–18).

Whether a retroactive provision is arbitrary is not to be determined by inquiring whether the person affected had reason to believe that his transaction might be taxed. Any such test would be unworkable. The constitutional power of Congress to include gifts cannot depend upon the date of the issuance of improper regulations; and the promulgation of improper regulations can not give validity to a subsequent act of Congress which would otherwise be invalid.

Moreover, there is no warrant for the petitioner's contention that when the decedent created this trust he "had every reason to believe that the trust would be included in his gross estate". There is no evidence that the decedent actually had knowledge of the regulations, and a decedent cannot be charged with notice of anything except what the law is. At the time when he created the trust, the decision of this Court which was

most nearly in point indicated clearly that such a transfer as he made was not one within the statute then in effect. *Levy* v. *Wardell*, 258 U. S. 542, 544. And this Court subsequently so held. *Burnet* v. *Northern Trust Co., supra.*

There is no merit in the contention of the petitioner that after the passage of the amendment of 1931 the decedent could, by relinquishing his life estate, have prevented imposition of the tax. For until long after the decedent's death, the Treasury Department construed the amendments as not applicable to the trust which he created. Moreover, this contention would put an unwarranted burden on the decedent—giving up his own income. It would not at all affect his control over the corpus of the trust at the time of his death, for he had no control of the corpus.

II.

The amendments to Section 302 (c) of the Revenue Act of 1926 should be construed to apply only to transfers made subsequent to March 3, 1931.

Congress, when passing the Joint Resolution of March 3, 1931, intended it to apply prospectively only, as is shown by the statements made on the Floor of the House by the member in charge of the measure. This was the understanding of the Treasury Department, by which the bill was drafted, and the Treasury Department promulgated regulations showing that it should be applied prospectively only. These have never been modified as to transfers by decedents who died prior to the date of the Revenue Act of 1932, and it was not until after the death of Mr. Beebe that the Treasury Department sought to include transfers such as he made, in

the gross estate, even in the case of decedents dying after 1932.

The re-enactment of the Joint Resolution by Section 803 (a) of the Revenue Act, when the regulations above mentioned were in force, amounted to legislative approval of the Treasury Department's construction of the statute,—that it was to be without retroactive effect.

The reports of the committees in charge of the measure in 1932 show that the purpose of the amendment made at that time was merely to clarify previous amendments, and was not to give retroactive effect to the amendment made in 1931.

The amendments should be construed to apply only prospectively in order to avoid the necessity of declaring them unconstitutional.

The authorities require that wherever possible statutes should be construed to apply prospectively only. It is possible to construe the amendments to have no retroactive effect, and they should be so construed.

ARGUMENT.

I.

IF THE JOINT RESOLUTION OF MARCH 3, 1931, AND THE REENACTMENT THEREOF IN SECTION 803 (a) OF THE REVENUE ACT OF 1932 ARE CONSTRUED TO INCLUDE THE TRUST INVOLVED IN THIS CASE, THEY ARE TO THAT EXTENT INVALID AND VOID AS IN CONFLICT WITH THE PROVISIONS OF ARTICLE V OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INASMUCH AS THOSE STATUTORY PROVISIONS, IF APPLIED TO THIS TRANSFER IN TRUST, WOULD DEPRIVE THE ESTATE OF FRANK H. BEEBE AND THE EXECUTORS THEREOF OF PROPERTY WITHOUT DUE PROCESS OF LAW.

(a) This Conclusion is Required by Recent Decisions of the Supreme Court and is Reached in All the Cases Considering this Precise Question.

The transfer in question was made not later than 1926. On March 2, 1931, this Court held that the provisions of Section 402 (c) of the Revenue Act of 1921 and Section 302 (c) of the Revenue Act of 1924, providing for inclusion in the gross estate of gifts "intended to take effect in possession or enjoyment at or after" death, did not apply to trusts like that involved in the case at bar. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783.

Section 302 (c) of the Revenue Act of 1926 contained exactly the same provision as that just quoted. Prior to March 3, 1931, the Revenue Act contained no provision for the inclusion in the gross estate of property transferred to a trust under which the decedent was entitled to income for life. It is consequently manifest that, under the Revenue Act of 1926, the property transferred to the trust here involved could not be included in the gross estate. The petitioner, however,

now contends that its inclusion is authorized by the amendments to the Revenue Act of 1926 which were passed in 1931 and 1932. (For the language of the 1932 amendment see p. 2, *supra*.) This involves construing the amendments to apply to a transfer made years before their passage. If so construed, the amendments are unconstitutional.

The estate tax is "a tax upon a transfer of his net estate by a decedent." See *Edwards* v. *Slocum*, 264 U. S. 61, 62; *Nichols* v. *Coolidge*, 274 U. S. 531, 537. "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred . . . It is not a gift tax . . ." *Reinecke* v. *Trust Co.*, 278 U. S. 339, 347. It is "a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death." *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 334. "The exaction is not a succession tax . . . The right to become beneficially entitled is not the occasion for it." *Nichols* v. *Coolidge*, 274 U. S. 531, 540.

As this Court said in *Reinecke* v. *Smith*, 289 U. S. 172, 177:

> "Decisions of this court declare that where taxing acts are challenged we look not to the refinements of title but to the actual command over the property taxed,—the actual benefit for which the tax is paid."

The transfer involved in the case at bar was one which occurred in 1926. No transfer occurred at the death of the decedent. No privilege of transferring property was then availed of and no benefit then accrued.

Although it is settled that Congress may include in the gross estate gifts which are essentially testamentary in character, the inclusion of any transfers *inter vivos* may be justified only to the extent to which such inclusion is a proper adjunct of the general scheme of the estate tax.

It seems to be established that a transfer in trust, leaving the corpus subject to no control of the donor, is not essentially testamentary in character, even when the donor reserves a life estate. See *May* v. *Heiner*, 281 U. S. 238, 243; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39; and the cases cited above.

In *Helvering* v. *Bullard*, Supreme Court No. 349, October Term 1937, the Government argues that Congress has the power to include such property as an adjunct to its power to impose a tax on a transfer taking place at death. The Government's argument in that case is, in effect, that, if Congress deems it necessary to implement a valid tax scheme, it may reach out and include in the measure of that tax transfers *inter vivos* which would not in themselves be the proper subject of an estate tax. We submit that such an adjunctive power, if it exists, must be strictly circumscribed. A statute which imposes such a tax retroactively on transfers completed at a time when Congress had not indicated its intention to exercise this extraordinary power is, we submit, capricious and arbitrary.

As this Court said in *Nichols* v. *Coolidge*, 274 U. S. 531, 542:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."

On this ground this Court has uniformly held unconstitutional provisions of Federal taxing acts seeking to impose a tax on gifts fully consummated before any provision imposing such a tax was enacted. *Levy* v. *Wardell*, 258 U. S. 542; *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson*, 276 U. S. 440; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.

The situation presented in these cases is so similar to that involved in the instant case as to appear to be conclusive of the instant case.

In *Levy* v. *Wardell, supra,* the Court held that certain securities transferred in 1902 and 1907 could not be included in the gross estate under the Revenue Act of 1916. At the time of the transfers, the donees agreed to pay the donor the dividends accruing thereon during her lifetime. The Court said (p. 544):

> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, *and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment,* . . ." [Italics ours.]

In *Helvering* v. *Helmholz, supra,* the Court held unconstitutional, as applied to a gift made before its passage, the provision of 302 (d) of the Revenue Act of 1926 that there should be included in the gross estate, in determining the Federal estate tax, property

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment

thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

A majority of the Court decided the case on two grounds. The holding on the second ground was expressed in the following language of the opinion (pp. 97, 98):

"Another and more serious objection to the application of Sec. 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If Sec. 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531."

On this last ground all of the members of the Court concurred.

In *White* v. *Poor*, 296 U. S. 98, *supra*, the same provision of the Revenue Act of 1926—Section 302 (d)—was held to offend the due process clause of the Fifth Amendment, as applied to a trust created before its passage.

Section 302 (d) was held to be constitutional as applied to transfers made after its passage.

Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

It is unconstitutional only insofar as applied to transfers made before its passage.

The same objections which exist to Section 302 (d),

as applied retroactively, apply to the amendments to Sec. 302 (c) if applied retroactively. Each undertakes to include as part of the gross estate a transfer which was complete before the applicable statute was passed.

The corpus of the trust estate irrevocably passed out of the decedent as an individual in 1926; and it is the corpus of that estate which the Commissioner is now seeking to tax by virtue of a statute passed after the gift had taken effect. As in the *Helmholz* case, there remained no interest in the corpus of the trust in the grantor. The situation is consequently like that presented in *Nichols* v. *Coolidge*, 274 U. S. 531, *supra*, in which the Court said (p. 542):

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death."

The estate tax is paid by the executor and consequently is borne in effect by the residuary legatee under the will. It is clear that the executor has no right to compel the trustee or remaindermen under the trust to pay or contribute to the federal estate tax. *Bemis* v. *Converse*, 246 Mass. 131; *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488; Cf. *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

All of the decisions in cases involving the precise point under consideration have held that the amendments could not be constitutionally applied to irrevocable transfers completed before their enactment. In

addition to cases in the First Circuit, the following have decided the point—*Commissioner* v. *Marshall*, 91 F. (2d) 110 (C. C. A. 2d); *Bullard* v. *Commissioner*, 90 F. (2d) 144 (C. C. A. 7th); *Meyers* v. *Magruder*, 15 F. Supp. 488 (D. Md.) (not appealed by the Government); *Collins* v. *United States*, C. E. D. Va. Nov. 29, 1937, 384 C. C. H., ¶ 9035. There are a number of cases to the same effect in the Board of Tax Appeals. See, for example, *Whiting* v. *Commissioner*, 35 B. T. A. 100. See also *Matter of Craig*, 97 ~~App. Div.~~ 289, aff'd 181 N. Y. 551. 4th Div.

(b) The Contentions Made by the Petitioner are Untenable.

The petitioner's brief states that "there is nothing *per se* fatal about retroactivity" and cites a large number of statutes and decisions dealing with income taxes and *inheritance taxes*.

But the distinction between the effect of retroactivity in the case of estate and gift taxes, on the one hand, and in the case of taxes of certain other character, such as income taxes, is well understood. It is clearly expressed in the opinion in *Reinecke* v. *Smith*, 289 U. S. 172, where Section 219 (g) of the Revenue Act of 1924, taxing the grantor upon the income of a trust which he had the right to revest in himself, was upheld as to income from a trust created prior to its passage. The Court said (p. 175):

> "Nor do we think the act has such a retroactive effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440, and *Blodgett* v. *Holden*, 275 U. S. 142. *In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction.* In the present case the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the trustees, but

> the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States,* 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 379." [Italics ours.]

The case of *Cooper* v. *United States,* 280 U. S. 409, (heavily relied upon by the petitioner) was an income tax case. Certainly Congress may change the method of computing the income tax, and such changes may produce results from prior transactions which were not contemplated when the transactions were made.

The citations of inheritance tax statutes and cases under them add nothing novel or valuable to the questions here discussed. Objectionable retroactivity is not involved in any of those cases because the tax is imposed by excises upon the right to receive property. See *Coolidge* v. *Long,* 282 U. S. 582, 596 and also dissenting opinion therein (which involved the same trust involved in *Nichols* v. *Coolidge,* 274 U. S. 531), *Blodgett* v. *Guaranty Trust Co.,* 287 U. S. 509.

On page 16 of his brief, the petitioner states that *under appropriate circumstances* various excises have been sustained in spite of their retroactive character. [Italics ours.] Without extended discussion, we submit the following comment upon the cases cited for this proposition.

Patten v. *Brady,* 184 U. S. 608, does not involve any question of retroactivity at all. *Billings* v. *United States,* 232 U. S. 261 (annual excise on the use of yachts), *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, and *Hecht* v. *Malley,* 265 U. S. 144 (corporate excise tax based on income) indicate no more than that, on reasoning analogous to that used in the income tax cases,

excise taxes for an annual period may comprise transactions within the annual period for which they are applied. *Cahen* v. *Brewster*, 203 U. S. 543, involved an inheritance tax, not an estate tax.

Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226, is similar to and follows *United States* v. *Heinszen & Co.*, 206 U. S. 370. They are cases of the specific ratification by Congress of the collection of taxes imposed by governmental action, and, as shown by the opinion in the *Heinszen* case, are based squarely on the right of a principal to ratify acts of an agent assumed to be done on behalf of the principal. *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, is another ratification case.

We do not understand that the petitioner asserts that the amendments to Section 302 (c) of the Revenue Act of 1926 constituted a ratification of the prior illegal regulations. Certainly, the amendments did not purport to be ratifications, and it is significant that the Treasury Department itself showed clearly by the regulations which it promulgated on May 22, 1931, and April 11, 1932, that it did not construe them as ratifications. (See pp. 30–31, *infra*.)

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, a valid tax was collected after the period of limitations had run. The statute there considered involved the prohibition of a refund. The Court pointed out that this was not a case of creating liability as to a transaction to which no liability had previously attached, and said (p. 429):

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative

> intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."

Within the same principle falls *Swayne & Hoyt, Limited,* v. *United States,* 300 U. S. 297.

Other cases cited by the petitioner relate to the assessment and collection of local taxes on real estate and personal property—*Citizens National Bank* v. *Kentucky,* 217 U. S. 443; *Seattle* v. *Kelleher,* 195 U. S. 351; and *Locke* v. *New Orleans,* 4 Wall. 172. The nature of these taxes is so different from estate taxes that these cases have no application.

We submit that none of the cases referred to above furnishes any ground for suggesting that retroactivity of the character involved in this case is not a fatal objection to retroactive gift and estate taxes, and that none of said cases is in point.

We consequently pass to the cases involving estate taxes which are cited by the petitioner.

Milliken v. *United States,* 283 U. S. 15, held that if a gift in contemplation of death is made after the passage of a provision applicable to it, it is no ground for objection that a substantial re-enactment of that provision in a later Revenue Act taxed it at a higher rate.

Petitioner's brief quotes a sentence from the opinion in that case, but not the following significant extract (283 U. S. at pp. 20–21):

> "This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause. *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582."

The reason for the decision is contained in the following language of the opinion (p. 24):

> "The present gift was subject to the excise when made; and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was fore-warned at the time he elected to exercise the privilege, did not change its character."

In the instant case, however, the gift was not subject to any excise when made.

Third National Bank v. *White*, 287 U. S. 577, involved a tenancy by the entirety. For purposes of taxation the Court has treated tenancies by the entirety and joint tenancies alike, and held that both are taxable, even if created before the passage of the first estate tax act, because the rights of the survivor to the property held in such tenancies did not become finally and definitely fixed before the passage of the Act, and that it was the death of the decedent *after* the passage of the Act which "became the generating source of definite accessions to the survivor's property rights".

The only other cases involving estate taxes cited in support of this contention of the petitioner are *Klein* v. *United States*, 283 U. S. 231, 234–235, and *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160, 166. Neither of these cases involved application of a new provision of the statute to a gift which the Court regarded as transferring the entire interest in the corpus before its passage, and neither of them supports the reasoning of the petitioner.

The petitioner argues that there must be an investigation of the circumstances to determine whether a

retroactive provision is arbitrary, that the answer must depend on whether the decedent or other person affected had reason to believe that his transaction might be taxed, and that in the instant case the decedent did have reason so to believe. We submit that each link in this argument is unsound.

First. There is no such test as whether the person affected had reason to believe that his transaction might be taxed.

In *Untermyer* v. *Anderson,* 276 U. S. 440, this Court held that the gift tax imposed by the Act of June 2, 1924, must be construed as applicable to gifts made in 1924 prior to its passage but that it could not be constitutionally applied to a gift made on May 23, 1924, some three months after a bill providing for a gift tax was presented, and while the conference report on the bill was pending. The bill finally passed both houses on May 25, 1924. The Court said (pp. 445–446):

> "The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from the former one and to relieve the legislation of the arbitrary character there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures."

The test which the petitioner suggests would make constitutional rights depend upon considerations more vague than those rejected in the *Untermyer* case, for

his reasoning seems to be that the transaction may properly be taxed, although it was not taxable at the time when it occurred, if an executive department has erroneously construed the act in force at the time of the transaction as imposing the tax.

The test comes down to this—had the donor reason to believe that an existing act would be construed to mean something different than what it did mean? If a donor is chargeable with notice, it must be with notice of the true interpretation of the law and not with notice of incorrect interpretations expressed by a governmental department.

The argument of the petitioner is based largely upon the fact that the original estate tax act (that of 1916) contained a provision for the inclusion of gifts to take "effect in possession or enjoyment at or after" death and that the regulations of the Treasury Department took the view that this included a trust under which the settlor reserved the income for life. But (as his brief admits) the two earliest editions of the regulations contained no such provision, and such a provision did not appear until other regulations were promulgated in August, 1919. It would seem that the contention of the petitioner would not apply to gifts made prior to 1919. This would produce a curious result, *i. e.* that the Joint Resolution of 1931 could be constitutionally applied to transfers made after a certain day in August, 1919, but not to transfers made before that time. In other words, the constitutional power of Congress to include gifts would depend upon the date of the issuance of invalid regulations.*

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* *Whiting* v. *Commissioner*, 35 B. T. A. 100 (now pending in the Circuit Court of Appeals for the Ninth Circuit) in-

The unworkability of the test suggested in the petitioner's brief is well demonstrated by the situation dealt with in the cases of *Helvering* v. *Helmholz*, 296 U. S. 93, *supra*, and *White* v. *Poor*, 296 U. S. 98, *supra*. The petitioner attempts to distinguish these cases, by saying in his brief (pp. 29–30): "The transfers there were made at a time when there could be no similar expectation that they would be subject to such a tax as was there sought to be collected. There were no provisions under existing law that could have been given comparable color to a claim of taxability".

The petitioner has overlooked the fact that the Government did contend (see *Reinecke* v. *Northern Trust* Co., 278 U. S. 339, 342, and 345–346), that the broad general provisions of Section 402 of the 1918 and 1921 Acts included tranfers in trust like those involved in the *Helmholz* and *White* cases made before the passage of Section 302 (d) of the Revenue Act of 1926, which specifically included such transfers. Moreover in the *White* case, the transfer in trust was made in 1919 and a part of the income under the trust was payable to the grantor for life. Would the petitioner go so far as to contend that because of regulations then in force the decedent should have realized that her property transferred might be included in the gross estate, and consequently that her executors could not object to the retroactive application of a later provision (Section 302

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volved a transfer made in 1917 in trust under which the grantor was to receive the income for life. At the time when this was made, there was no regulation of the Treasury Department providing that property so transferred should be included in the gross estate. The logical result following the argument of the petitioner seems to be that such a transfer could not be subjected to the estate tax. Such a differentiation seems to us to be impossible and to illustrate the difficulties with the argument which the petitioner makes.

(d) of the Revenue Act of 1926), seeking to include it in the gross estate on another ground? This would seem to follow if the test is, as the petitioner suggests, whether the regulations of the Treasury Department were such as to lead the decedent to believe that the transfer might be taxed.

Second. Equally unsound is the final link in the argument of the petitioner, *i. e.* that the situation was such that when the decedent created the trust in question "he *then* had every reason to believe that the trust would be included in his gross estate".

The argument to this effect is preceded by a long discussion of the provisions of state taxes and the regulations of the Treasury Department and other matters. Although the brief states that its position "does not require a re-examination of the three *per curiam* decisions of March 2, 1931",* most of the argument seems to be designed to support the statement made in the brief (p. 23) that "It does not seem too much to say that it [a transfer with retention of life estate] was *the* type of transaction which was in fact intended to be included by this provision". We submit that the decisions of March 2, 1931, give all of this line of argument its quietus. The contentions which are made in this part of the brief and the material in support thereof are substantially the same as what appears in the Government's briefs on the merits of those three cases. Regardless of the opinion which may have been entertained by some members of the Treasury Department and some members of Congress, the fact remains that this Court held that Congress did not intend to

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* *Burnet v. Northern Trust Co.*, 283 U. S. 782, *supra; Morsman* v. *Burnet*, 283 U. S. 783, *supra; McCormick* v. *Burnet*, 283 U. S. 784.

include such transactions in the Revenue Acts in force prior to 1931. The decision of the Court in effect was that the regulations of the Treasury Department were unwarranted. The argument of the petitioner consequently resolves itself into this proposition: If the Treasury Department construes an act improperly, its arbitrary action validates a retroactive act which would otherwise be invalid.

The petitioner argues that it is important to ascertain what a donor would have believed as to the taxability of his gift at the time when he made it. There is nothing in the record to show that the decedent here actually knew that such Treasury regulations had been promulgated. Everything in the evidence is to the contrary. (See testimony of Welch, R. 45; testimony of Meyer, R. 56.) If there is any inference as to what the decedent should have believed, it must be that he would have believed the law to be as this Court decided in the three cases above cited. Certainly a taxpayer cannot be expected to familiarize himself with the laws and decisions of all of the States of the Union; and an erroneous Treasury ruling is no basis for his assuming that Congress will change the law, even prospectively, to read as the Treasury Department thought it should be, and still less gives any warning that there will be future retroactive legislation.

If in 1926 the decedent had made an examination of the law, he would have seen that *Levy* v. *Wardell,* 258 U. S. 542, 544, decided in 1922, (p. 12, *supra*) had held that a trust similar to the one he was creating was not one "intended to take effect in possession or enjoyment" at death.

The brief for the petitioner finally asserts that the tax "is even less open to the charge of arbitrariness or caprice than most retroactive taxes that have been sustained" because the decedent "could have prevented the imposition of the tax by relinquishing his life estate". This seems to us to be a most extraordinary position for the Government to take. Soon after the amendment of March 3, 1931, was passed (on May 22, 1931), the Secretary of the Treasury issued formal rulings to the effect that it was not to apply to transfers made before its passage. (See p. 30, *infra.*) This position was adhered to at all times up to the date of the death of the decedent and, indeed, for several years thereafter.

The position of the Government consequently is that the estate should be penalized because the decedent did not do something which the Treasury Department by its regulations in effect stated was unnecessary. It had given the country its assurance that it would not attempt to tax such a transaction, but it now seeks to justify the levying of the tax on the ground that the donor should have distrusted it!

The petitioner insists that the donor should have been warned by its regulations in 1926 (although they were held invalid by this Court during his lifetime) but that on the other hand he should have disregarded its regulations of 1931. Its contentions leave us in a maze of inconsistencies.

The petitioner, in support of the argument last mentioned, quotes language from *United States* v. *Chase National Bank,* 82 F. (2d) 157, 158 (C. C. A. 2nd.) But that was a case where the decedent had retained until her death the power to designate the owner of the corpus of the trust. Because of the

retention of that power (which was equivalent to testamentary control over the property), it was held that the corpus of the trust should be included in the gross estate under a statute passed subsequent to the creation of the trust. She did not effectively part with the corpus. Thus the trust was taxable on the same principles as were the revocable trusts under *Porter* v. *Commissioner*, 288 U. S. 436, and those dealt with in the first part of the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 379. But this furnishes no support for the proposition that where the decedent has effectively parted with the title to and control over the corpus of the property and is powerless to do anything in regard to it, the transfer can be retroactively taxed because he did not desire also to give up his right to the income.

Even if the contention made in the language quoted from the *Chase National Bank* case is sound* as applied to the situation there involved, it is clear that it has no application to the situation here involved. An examination of the Government's brief in the Circuit Court of Appeals in *Commissioner* v. *Marshall*, shows that this very contention was made in the *Marshall* case, which is exactly like the instant case. Nevertheless the Circuit Court of Appeals for the Second Circuit, which decided the *Chase National Bank* case, decided the *Marshall* case in favor of taxpayer.

As we have stated, this argument of the petitioner

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* The language in question was not necessary for the decision in the *Chase National Bank* case. Exactly the same contention might have been made in *Helvering* v. *Helmholz*, 296 U. S. 93, *supra*, and in *White* v. *Poor*, 296 U. S. 98, *supra*. If it had been sound, those cases would have been decided in favor of the Government instead of in favor of the taxpayers, as they were.

seems particularly far-fetched in view of the fact that, during all of the time after the enactment of the amendment until the death of the decedent, the Treasury Department construed the amendment as not applicable to transfers made prior to its passage. This was not true of the transfer in the *Chase National Bank* case.

If we disregard the question whether such relinquishment as that suggested in the *Chase National Bank* case might not in itself involve a tax, the transaction would not have diminished the decedent's resources. In the case of a trust under which he has a life estate, cases of great hardship can easily be imagined. Certainly it would involve the loss of income for life. It might leave him in want. His only alternative (under the Government's theory) would be to subject his remaining estate to an estate tax, which might completely consume it.

II.

THE AMENDMENT TO SECTION 302 (c) OF THE REVENUE ACT OF 1926 MADE BY THE JOINT RESOLUTION OF MARCH 3, 1931, AND BY SECTION 803 (a) OF THE REVENUE ACT OF 1932, SHOULD BE CONSTRUED TO APPLY ONLY TO TRANSFERS MADE SUBSEQUENT TO MARCH 3, 1931.

The statutes above referred to are copied on pp. 39–41, *infra*.

We contend that the amendment should not be construed to apply to transfers made prior to its passage.

(a) Congress when passing the Joint Resolution of March 3, 1931 intended it to apply prospectively only.

The amendment of March 3, 1931, was drafted by the Department of the Treasury and submitted to the Speaker of the House of Representatives with a letter from the Secretary of the Treasury suggesting its early passage in view of the decisions the day before in *Burnet* v. *Northern Trust Company*, 283 U. S. 782, and other cases. In the opinion in the *Northern Trust Company* case, the Court said that there was "no question of the constitutional authority of the Congress to impose *prospectively* a tax with respect to transfers or trusts of the sort here involved". [Italics ours.]

The resolution was reported from the Committee on Ways and Means by a member of that Committee, Mr. Hawley, who, in explaining it on the floor of the House, said, "It provides that *hereafter* no such method shall be used to evade the tax." [Italics ours.] In the House, Mr. Garner of the Ways and Means Committee said:

> "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retro-

> active for the reason we were afraid that the Senate would not agree to it."

(Congressional Record, Seventy-First Congress, Third Session, Vol. 74, Part 7, pp. 7198–7199.)

As the brief for the respondent in No. 484 points out, it is fair to assume that Congress and the Treasury Department were in accord as to its meaning, as the Resolution was drafted by the Treasury Department and passed at its earnest request. A reading of the Congressional Record shows that the Congressmen and Senators who made statements on the floor got their views from the Treasury Department, which drafted the bill, and, as we point out hereafter, it is clear that the Treasury Department understood the measure as not providing for retroactive operation.

It is, of course, well recognized that the expressions of intention by Congressional Committees and spokesmen for the bill in Congress may be resorted to in the aid of the construction of the statutes to which they relate, if their meaning is not free from doubt.

See *Humphrey's Executor* v. *United States,* 295 U. S. 602, 624; *United States* v. *Great Northern Ry. Co.,* 287 U. S. 144, 154.

(b) The Treasury Department ruled that the amendment should be applied prospectively only, and that construction should not be set aside.

The Treasury Department itself ruled that the amendment should be applied prospectively only.

T. D. 4314 (C. B. X-1, p. 450, approved by the Secretary of the Treasury, May 22, 1931) was an instruction from the Commissioner in the form of a letter "To Collectors of Internal Revenue and Others Concerned." After quoting the language of the amendment this decision reads:

> "In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10.30 P. M., Washington, D. C., time, March 3, 1931."
>
> "Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

(Italics here represent italics in original. We specifically call attention to the fact that the words "prospectively" and "after" were italicized. This Treasury Decision has the same effect as a Regulations, and is to be distinguished from mere rulings of the Bureau, as appears by the explanatory statement on the title page of the Internal Revenue Bulletin itself.)

The amendment to Regulations 70 was formally made on April 11, 1932, by T. D. 4336 (which is printed on pages 42–43, *infra*).[1]

The contemporaneous construction of the Treasury Department should not be disturbed.

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[1]The practice of the Treasury Department has never been changed as to decedents dying prior to June 6, 1932; and until November 7, 1934 the Government never took the position that the amendment made by the 1932 Act applied retroactively. (As the brief for respondent in No. 484 points out, there is no basis for distinction between the two amendments.) The Government had not taken this position at the time of the death of the decedent here or at the time when the estate tax return was filed, November 14, 1933. Neither in the deficiency letter, dated February 8, 1935, nor in the letter denying claim for refund, dated June 11, 1935, did the Commissioner rely on the amendment to Section 302 (c) of the Revenue Act of 1926. (R. 8, 14.) Although the regulation of November 7, 1934, did purport to require the inclusion of trusts like that here involved in the gross estates of decedents dying after June 6, 1932, the Government does not appear actually to have relied upon it until several years later.

Thus in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, (argued on Oct. 15, 1935, and decided on Nov. 11, 1935) the Commissioner sought to include in the gross estate property transferred to a trust established in 1930. As appears from the opinion of the Circuit Court of Appeals, 74 F. (2d) 242, 243, the decedent died May 20, 1931, after passage of the Joint Resolution under discussion. The trust there in question provided that the income should be paid to the decedent herself until her death or the termination of the trust, after her death to her husband, with gifts over to her children and other descendants. The trust was consequently very similar to the trust here involved. But it does not appear from the opinions of the Board of Tax Appeals, of the Circuit Court of Appeals or the Supreme Court that in any of these tribunals the Government argued that the property could be included because of the Joint Resolution. If there had been any merit in such a contention it is remarkable that the matter was not mentioned in any of the three opinions. The Government lost the case both in the Board and in the Circuit Court of Appeals, and it seems fair to assume that in the argument in the Supreme Court it would have taken the position which it is now taking in the instant case if it had considered it even

(c) The re-enactment of the Joint Resolution by Section 803 (a) of the Revenue Act of 1932 amounted to legislative approval of this construction of the statute.

Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution, was further amended by Section 803 (a) of the Revenue Act of 1932. We submit that, for the purposes of this case, no change was introduced by the second amendment. At the time when Section 803 of the Revenue Act of 1932 was passed, the position of the Treasury Department, as announced in T. D. 4314 and in Regulations 70, 1929 edition, as amended by T. D. 4336, was that the amendment would only be applied *prospectively,* as we have shown.

We invoke the principle of statutory construction, of frequent application to revenue acts, that the re-enactment of a statutory provision in the light of approved and published executive construction of the statute amounts to an implied legislative recognition and approval of such executive construction of the statute. *Murphy Oil Company* v. *Burnet,* 287 U. S. 299, 307; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273; *United States* v. *Dakota-Montana Oil Company,* 288 U. S. 459, 467.

The fact that the 1932 amendment introduced no substantial change, as far as this case is concerned, into Section 302 (c) as amended by the Joint Resolution of March 3, 1931, and was enacted in the light of the pub-

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arguable. The brief of the petitioner admits that the Government did not take that position in that case. (Footnote, p. 10.)

In *Kienbusch* v. *Commissioner,* 35 B. T. A. Docket No. 80550 (promulgated October 28, 1936) it appears affirmatively that the Government did not contend that Section 803 (a) of the 1932 Act could be applied retroactively.

lished Treasury Decisions and amendment of the estate tax Regulations above referred to, gives strong basis to conclude that Congress, in passing the 1932 amendment, approved the construction placed by the Treasury Department on the 1931 amendment and intended that Section 302 (c), as amended, should be applied in the case of trusts where life estates were retained, prospectively only—that is, only to those trusts created subsequent to the passage of the 1931 amendment.

The reports of both the House Committee on Ways and Means and the Senate Finance Committee relating to Section 803 state that its purpose was to clarify in certain respects the amendments made by the Joint Resolution of March 3, 1931, and stated:

> ". . . Certain new matter has also been added *which is without retroactive effect. . . .*" [Italics ours.]
>
> (Report of Committee on Finance, Senate Report No. 665, 72d Congress, 1st Session, p. 49).

Any reason that could be advanced for making the provisions of the amendment, as clarified, retroactive would be equally applicable to the new matter introduced in the 1932 amendment. The statement of the two committees is therefore of great significance, for it is explicable only upon the basis that the committees believed that the whole subject matter of the 1931 and 1932 amendments to Section 302 (c) would be without retroactive effect.

(d) The amendment should be construed to apply only prospectively in order to avoid declaring it unconstitutional.

As we have shown above (pp. 9–15) the amendment to Section 302 (c) of the Revenue Act of 1926, if applied to transfers made prior to its passage, is unconstitutional. Under the circumstances, the case presents the occasion for this Court to construe the statute as not being retroactive in accordance with the following principle stated in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

See also, to the same effect, *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific R. R. Co.* v. *Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Lucas* v. *Alexander*, 279 U. S. 573, 577; *Russian Fleet* v. *United States*, 282 U. S. 481, 492.

(e) The authorities require that, wherever possible, statutes be construed to apply prospectively only.

This Court has uniformly construed taxing acts as being prospective merely wherever the language of the Act was in any possible way susceptible of such construction.

See, for example, *Shwab* v. *Doyle*, 258 U. S. 529, where the Court held that the estate tax levied by the Revenue Act of 1916 which included in the estate of a decedent property which the decedent "has at any time made a transfer . . . in contemplation of or intended to take effect at or after death" did not apply to a

transfer made prior to the enactment of the statute, saying (p. 537):

> ". . . a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916."

In *Bingham* v. *United States*, 296 U. S. 211, § 402 (f) of the Act of 1918, which provided for inclusion in the gross estate the value of all property "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries [*i. e.* except the executor] as insurance under policies taken out by the decedent upon his own life", was held not to apply to policies taken out by decedent and assigned by him to the beneficiaries before the original enactment of the statute.

This case was followed in *Industrial Trust Co.* v. *United States*, 296 U. S. 220, involving § 302 (g) of the Revenue Act of 1926, despite subsection (h) of that section which is the identical subsection which the appellee here contends shows that the amendment to Section 302 (c) should be applied retroactively. In that case the Court said (p. 221):

> "The case of *Lewellyn* v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918. This case arises under the act of 1926, § 302 (g), which is the same as § 402 (f) of the former act. Subdivision (h) of the 1926 act, however, provides that subdivisions (b), (c), (d), (e), (f), and (g) shall apply to 'transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.' Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable.

See *Wyeth* v. *Crooks,* 33 F. (2d) 1018, 1019. If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls."

In *Union Trust Co.* v. *Wardell,* 258 U. S. 537, the Court applied the rule of construction which we urge to a trust by the terms of which the decedent had reserved the income to himself for life with gifts over on his death. The language construed was Section 202 (b) of the Revenue Act of 1916, which read, "to the extent of any interest therein of which the decedent has *at any time* made a transfer" etc. The Court construed this language as not applying to a transfer made prior to the passage of the Act.

Among other cases in which Acts have been construed as not retroactive are the following: *Lynch* v. *Turrish,* 247 U. S. 221, 230; *Levy* v. *Wardell,* 258 U. S. 542; *Knox* v. *McElligott,* 258 U. S. 546; *Brewster* v. *Gage,* 280 U. S. 327, 337.

See also *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.,* 266 U. S. 435.

In several cases the Board of Tax Appeals has construed the amendment made by the Joint Resolution of March 3, 1931 and Section 803 (a) of the Revenue Act of 1932 as applying only to transfers made subsequent to March 3, 1931. *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248; *Fidelity-Philadelphia Trust Co.* v. *Commissioner,* 34 B. T. A. 614; *Dahl* v. *Commissioner,* 35 B. T. A. 282.

(f) The language of the amendments does not require that they be construed as being retroactive.

Both the Joint Resolution of March 3, 1931, and Section 803 of the Revenue Act of 1932 include interests "of which the decedent has *at any time* made a transfer by trust or otherwise", etc. That the words italicised, "at any time", should not be construed to give the matter retroactive application is settled by the cases, including *Shwab* v. *Doyle,* 258 U. S. 529, and *Union Trust Company* v. *Wardell,* 258 U. S. 537, cited just above.

Subdivision (h) of Section 302 of the Revenue Act of 1926 does not necessarily require retroactive operation of the amendments to subdivision (c) of that section. This provision does not direct a general retroactive application of the estate tax. It directs that the particular, designated subdivisions shall apply retroactively. The subdivision (c) enacted by amendment in 1931 and 1932 was not the subdivision (c) thus referred to and thus designated to apply retroactively. The transfers subjected to the estate tax by the amendments were newly defined transfers, not subjected to the estate tax by subdivision (c) of the Revenue Act of 1926. Subdivision (h) above does not in terms require retroactive operation of any additions subsequently included by later amendments. The amendments do not by their own terms require retroactive operation, and they are new in substance.

Neither the Joint Resolution nor the Act of 1932 brought up to date or re-enacted subdivision (h) of Section 302 (c) of the Revenue Act of 1926. We submit that the mere fact that these amendments were enacted as amendments to the existing estate tax law (which

included subdivision (h)) does not necessarily require retroactive operation.

The question is—what did Congress intend? And its intention must be determined by a consideration of all the principles which are applicable to the construction of statutes. These principles, as we believe that we have demonstrated, require the construction for which we contend.

III.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

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February 1, 1938.

APPENDIX.

STATUTES AND REGULATIONS INVOLVED.

Statutes.

Section 302 of the Revenue Act of 1926 (44 Stat. 70-71) provided:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . .
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."
>
> . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g)

of this section shall apply to transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The Joint Resolution (Pub. 131) (46 Stat. 1516), approved March 3, 1931, amended subsection (c) to read as follows:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Section 803 of the Revenue Act of 1932 (47 Stat. 279; 26 U. S. C. § 411 (c)) provided:

"(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an ade-

quate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Regulations.

Internal Revenue Bulletin, Cumulative Bulletin X-1 pp. 450–451.

TRANSFERS BY DECEDENT IN HIS LIFETIME.

REGULATION 70 (1929), ARTICLES 17 AND 18: X-22-5086
General (transfers intended to take effect T. D. 4314
in possession or enjoyment at or after death).

Estate tax—Joint resolution of March 3, 1931.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302 (c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10:30 P. M., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S.,

238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long*, (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.*, v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10:30 P. M., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved May 22, 1931.
A. W. MELLON,
Secretary of the Treasury.

Internal Revenue Bulletin, Cumulative Bulletin XI-1, p. 329:

REGULATIONS 70 (1929), ARTICLE 18: Reservation of income or an annuity. XI-16-5455 T. D. 4336

ESTATE TAX—TRANSFERS

Article 18, Regulations 70 (1929 edition, as amended by Treasury Decision 4825 [C. B. IX-1, 356], amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 18 of Regulations 70 (1929 edition), approved March 23, 1929, as amended by Treasury Decision 4285, approved March 15, 1930, is further amended to read as follows:

ART. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 P. M., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoy-

ment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved April 11, 1932.

OGDEN L. MILLS,
Secretary of the Treasury.

Treasury Regulations 80 (approved Nov. 7, 1934)

ART. 18. Transfers with possession or enjoyment retained. — *(a) Transfers included.* — The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedet subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 P. M., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 P. M., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.